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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's	)	RM - 8577
Rules To Preempt State and Local	)	
Regulation of Tower Siting For	)	
Commercial Mobile Services Providers	)	

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To: The Commission

COMMENTS OF McCAW CELLULAR COMMUNICATIONS, INC. IN SUPPORT OF PETITION FOR RULE MAKING

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IN SUPPORT OF PETITION FOR RULE MAKING

McCaw Cellular Communications, Inc. ("McCaw")[1/], by its counsel and pursuant to Sections 1.405 and 1.04 of the Federal Communications Commission's ("FCC") Rules, hereby submits these comments in support of the Petition for Rule Making filed by Cellular Telecommunications Industry Association ("CTIA") on December 22, 1994.[2/] CTIA has asked the Commission to initiate a rule making to consider preempting state and local regulations that have the purpose or effect of prohibiting or unduly impeding the placement or construction of tower site facilities used to provide commercial mobile radio services ("CMRS"). McCaw agrees that there is a substantial and immediate need for Commission action to preempt the growing patchwork of state and local cell-siting restrictions that are impeding the development of the national telecommunications infrastructure.

1/ McCaw is a wholly-owned subsidiary of AT&T Corp.

2/ See Public Notice, Report No. 2052 (rel. Jan. 18, 1995).

Introduction and Summary

McCaw currently provides cellular service to over 3 million subscribers making it the nation's largest cellular carrier. Additionally, McCaw is the country's fifth largest provider of wireless messaging services and, through its subsidiary Claircom Communications Group, L.P., is one of the nation's three commercial air-ground providers. McCaw also holds a nationwide narrowband PCS license, and its affiliate, AT&T Wireless PCS, Inc., is an active bidder in the ongoing broadband PCS MTA auction.

From its unique vantage point as a national provider of diverse wireless communications services, McCaw has observed in recent years an alarming increase in the number and variety of state and local regulatory constraints that have the purpose or effect of preventing or substantially hindering the installation of cell-site facilities essential to the provision of innovative, efficient and economical CMRS services. This patchwork of restrictions has reached critical proportions. It poses a serious threat to the continued vitality and development of the national wireless infrastructure and the emergence of future wireless telecommunications services. Appropriate Federal guidelines are necessary now to eliminate unreasonable cell-site restrictions and ensure the growth of CMRS services. The Commission should act swiftly to initiate a rule making to preempt state and local regulatory practices that have the purpose or effect of preventing or unduly impeding the location,

construction, modification or operation of CMRS cell-site facilities.

I. State and Local Cell-Siting Restrictions are Impeding the Development of Wireless Communications Services

Unquestionably, the nation stands poised on the threshold of a wireless communications revolution. The past several years have witnessed extraordinary growth in consumer demand for innovative, efficient and economical commercial mobile radio services, including cellular, messaging, SMR, and ESMR services. For example, CTIA reports that as of December 1991, there were approximately 7.5 million cellular subscribers nationwide.[3/] As of June 1994, that figure had soared to more than 19 million subscribers, an increase of over 375 percent.[4/] The year-end cellular subscriber count for 1994 is expected to be approximately 25 million. Notwithstanding this tremendous growth rate, the anticipated 1994 year-end subscriber figure represents a relatively low nationwide cellular penetration level of slightly less than 10% of the U.S. population. Clearly, there is substantial room for new entrants and additional subscriber growth in cellular and other CMRS services.

With increased subscriber levels and traffic volumes, there has been an accelerating demand for channel capacity that has generated a critical need for additional cell-sites. CTIA has estimated that as of December 1991, there were 6,685 cell-sites

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[3/] CTIA Industry Mid-Year Data Survey (June 30, 1994).

[4/] Id.

nationwide.[5/] As of June 1994, that number had nearly trebled to approximately 15,000. Importantly, CTIA has reported that cellular carriers may require 15,000 new cell-sites over the next 10 years to complete their coverage and meet anticipated demand.[6/] Unquestionably, the emergence of new wireless services (e.g., broadband PCS, narrowband PCS, ESMR) will heighten this demand for cell-sites. Indeed, CTIA has projected that as many as 100,000 additional cell-sites may be required for the roll-out of PCS.[7/] Thousands more will be needed for ESMRs and other innovative wireless services.

Meanwhile, restrictive state and local regulations are acutely constraining and delaying the construction and modification of essential cell-sites, and increasing the costs of acquisition, approval and installation of such facilities. Virtually every community in the nation has certain zoning and other land use restrictions that must be satisfied before cell-site facilities can be constructed or modified.[8/] Frequently,

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[5/] Id.

[6/] See CTIA Reinventing Competition, The Wireless Paradigm and the Information Age at 13.

[7/] Id. Cell-sites are as varied as the needs they serve. McCaw's sites range from 10 inch in-building micro cells to 500 foot radio towers located in remote, rural areas. Power levels of these facilities range from 0.1 Watts for microcells to 500 Watts for rural facilities.

[8/] For example, in the South Florida market (Broward and Dade Counties), there are approximately 55 different municipalities, each with their own zoning and land use codes. A determination by any one of them is usually insignificant to the others.

wireless communications uses are not contemplated by local ordinance and are prohibited, thereby requiring special use permits or variances. Increasingly, these restrictions and requirements are being used to thwart the efforts of carriers to add new cell sites, sectorize cells and add channels to existing facilities necessary to accommodate the rapidly expanding public demand for CMRS services. Often, restrictions take the form of land use development codes (e.g., platting requirements, development review procedures), zoning ordinances (e.g., allowable use regulations, height limitations, discriminatory tower use provisions), construction moratoria (which prohibit new construction) and other similar policies that directly prohibit the construction or modification of cell-site facilities.

In other cases, restrictions arise from practices or procedures that have the effect of hindering or preventing cell-siting efforts by imposing complex licensing, waiver and exemption requirements, multiple levels of review, restrictive technical or operational parameters, burdensome taxes or "surcharges[9/]" and other significant hurdles that significantly increase cell-siting costs and impose substantial delay.

Frequently, such regulations are developed as a political response to the unfounded claims of a few vocal constituents who

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[9/] For instance, some jurisdictions impose registration or fee requirements for cell-site installation and "monitoring." In one Florida community, local officials are presently contemplating an ordinance that would require the placement of cell-sites on municipal property, and would impose a land use charge equivalent to a certain percentage of the carrier's revenues.

wrongly assert that the low-level electromagnetic radiofrequency ("RF") emissions generated by cell-sites pose a health risk to the community. Although these charges are firmly belied by exhaustive studies, expert testimony and the Commission's own determination that cellular facilities operate far below the well-established Federal limits for RF radiation, an increasing number of states and localities have established their own standards for RF regulation.[10/] In several jurisdictions where McCaw operates (e.g., Seattle, Washington, and Portland, Oregon), there are not one but three sets of separate, overlapping standards for assessing RF exposure from transmission facilities -- Federal, county and municipal.

Significantly, as cellular and other wireless services have become more widely available, they have proven to be invaluable enhancements to personal and public safety. For instance, cellular service has consistently demonstrated its utility as a critical communications link during widespread disasters such as the Miami hurricane and the California forest fires and

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[10/] In response to the Commission's Notice of Proposed Rulemaking in the Matter of Guidelines for Evaluating the Environmental Effects of Radio frequency Radiation, ET Docket No. 93-62, 8 FCC Rcd 2849 (1993), McCaw urged the Commission to preempt state and local oversight of RF emissions associated with cell-sites. See Comments of McCaw Cellular Communications, Inc., in ET Docket No. 93-62 (filed Jan. 25, 1994) at 17-31 (hereinafter "McCaw RF Comments"). In a pending petition for rule making, the Electromagnetic Energy Alliance ("EEA") has asked the Commission to initiate a proceeding to consider rules preempting state and local oversight of RF exposure from cellular facilities. See Petition For Further Notice of Proposed Rulemaking in ET Docket No. 93-62, filed by the Electromagnetic Energy Alliance (Dec. 22, 1994). McCaw supports the EEA's proposal.

earthquakes. Moreover, cellular is also widely used on the nation's roadways to report accidents and seek assistance, and in remote locations where other communications services are unavailable. In recognition of the increasingly vital role that wireless services play in promoting the public health and safety, members of the public safety community routinely support carriers' efforts to obtain local approval for new or modified cell-sites.

Regardless of whether states and localities establish regulations that directly limit transmission facilities or whether they engage in practices that indirectly have the same effect, these constraints hobble the ability of CMRS providers to respond to the ever expanding and changing consumer demand for mobile radio services, and increase the costs to the public of providing such services, thereby frustrating the important Federal interest in ensuring the growth and development of a truly competitive, ubiquitous, economical wireless telecommunications infrastructure.

II. **Federal Preemption of State and Local Cell-Siting Regulations Is Both Necessary and Appropriate**

As articulated in greater detail by CTIA, the Communications Act plainly contemplates that disparate state and local cell-site regulations can and should be preempted. In enacting Section 332(c) of the Communications Act, Congress deliberately established a uniform Federal framework for the regulation of CMRS because it found that mobile services "by their nature,

operate without regard to state lines as an integral part of the national telecommunications infrastructure."[11/] Lawmakers also recognized that a patchwork of disparate state and local regulatory hurdles would hinder and undermine the growth and development of wireless communications services.[12/]

Although the House Report identifies "facilities siting issues (e.g., zoning)" as an example of "terms and conditions" that were left to the general regulatory purview of the states, this exemption should be construed narrowly in a manner that advances rather than impedes Congress's express desire to eliminate unwarranted regulatory burdens and encourage the growth and development of mobile services. Federal lawmakers surely did not contemplate that states and localities should be permitted to eviscerate the clearly articulated goals of Section 332(c) through the unfettered exercise of zoning authority. Such a result would be fundamentally inconsistent with Congress' objective of removing state and local regulatory barriers to the growth and development of wireless services.

Even apart from the mandate of Section 332(c), both the Commission and the courts have long recognized that the Commission has the authority -- and, indeed, the obligation -- to preempt inconsistent state and local regulations that frustrate

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[11/] H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1990) ("House Report").

[12/] See H.R. Rep. No. 213, 103d Cong., 1st Sess. 490 (1990) ("Conference Report") (intent of revised Section 332 is to "establish a Federal regulatory framework to govern the offering of all commercial mobile services") (emphasis supplied).

important Federal objectives.[13/] The Commission's prior actions preempting local zoning and other regulations pertaining to receive-only satellite earth stations,[14/] and amateur radio towers,[15/] provide solid precedent for preemption of cell-siting regulations that implicate similar, significant Federal considerations.[16/]

McCaw recognizes that states and localities play an essential role in resolving local zoning and other land use issues that implicate genuine health, safety and welfare concerns. However, the Commission needs to prescribe rules that strike a reasonable balance between the legitimate exercise of local regulatory authority on the one hand, and the general public interest in ensuring that incumbent wireless providers and new competitors have the ability to develop and improve their facilities without irresponsible local jurisdictions imposing undue costs and delay.[17/] A uniform Federal regulatory

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[13/] See e.g., Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 n. 4. (1986); American Broadcasting Co. v. FCC, 191 F.2d 492 (D.C. Cir. 1951).

[14/] Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 59 Rad. Reg. 2d (P&F) 1073, recon. denied, 61 Rad. Reg. 2d (P&F) 608 (1986).

[15/] Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 101 FCC 2d 952 (1985).

[16/] See Petition of CTIA at 14-16.

[17/] See e.g., Remarks of Commissioner Rachelle Chong to the Cellular Telecommunications Industry Association, New Orleans, LA (Feb. 1, 1995) at p. 7 ("[t]he FCC must balance the federal interest in ensuring the development of a competitive, efficient mobile services infrastructure against the legitimate interest of (continued...)

framework should respect the reasonable and legitimate needs of local officials to regulate facilities citing issues, but at the same time ensure the elimination of burdensome local regulatory practices that frustrate Federal objectives.

Generally, this framework should seek to preempt state and local regulations that prohibit or have the effect of prohibiting the construction or modification of cell-site facilities by imposing undue costs, delay or operational limitations. Federal regulations should preempt state and local authorities from regulating facilities used to provide commercial mobile radio services to the extent such regulation unduly delays the placement, construction, modification or operation of such facilities; imposes undue costs, surcharges or expenses; or prohibits or has the effect of prohibiting the provision of service at a carrier's chosen level of coverage and quality.

Described below are various examples of recent regulatory actions that have prevented or unduly delayed the construction of additional cell-sites necessary to improve and expand wireless service. They exemplify the various types of disparate state and

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17/(...continued)
local governments in regulating local zoning matters...." "[A]t a minimum, the Commission must enunciate in no uncertain terms, the important federal interest in ensuring the development of a nationwide mobile services infrastructure"); Remarks of FCC Chairman Reed H. Hundt to the Cellular Telecommunications Industry Association New Orleans, LA (Feb. 1, 1995) at p. 11 ("At the local level, we need to ensure that local zoning restrictions do not derail the build-out [of new wireless services]...." "[I]f a truly ubiquitous competitive wireless market is to develop, the industry cannot be held up by occasionally irresponsible local zoning boards").

local cell-siting constraints that would be eliminated by adoption of uniform Federal regulations consistent with the general principles outlined above. This list is by no means exhaustive; it is merely illustrative of the types of disparate, state and local regulatory barriers that, if left unchecked, will continue to frustrate Federal objectives by obstructing the installation and modification of cell-sites and ultimately imperiling the continued vitality and development of our nation's wireless telecommunications infrastructure.

ZONING REGULATIONS THAT HAVE PREVENTED OR DELAYED NEW CELL-SITES

Village of Tarrytown, New York - Village officials adopt restrictive zoning ordinance after local courts repeatedly invalidate cell-site construction moratoria.

- In direct contravention of Federal policies favoring the introduction of new, competitive cellular services, the Village of Tarrytown adopted a local zoning ordinance in December 1994 that effectively prohibits the construction of new cell-sites necessary for the entry and development of new cellular service.

  Prior to adoption of the zoning ordinance, Cellular Telephone Company ("CTC"), McCaw's New York, NY MSA licensee, had been forced to undertake costly legal action to have two separate but virtually identical cell-site construction moratoria declared invalid, null and void. Nonetheless, despite a series of judicial rulings declaring the moratoria invalid, local officials purported to extend the terms of both moratoria through December 20, 1994. Then, on December 21, 1994, the Village adopted an amendment to its zoning code purporting to regulate the installation of new cellular antennae and limiting their number to the Village's "fair share" by employing a complicated ratio of the Village's land area to that of all of Westchester County. Application of this ratio has precluded CTC from constructing its proposed cell-site, and has effectively prohibited the entry of new CMRS services to the Village and surrounding community. The ordinance has the effect of prohibiting existing CMRS providers from expanding beyond current levels of service.

CTC is currently challenging the Village ordinance and must await yet another court determination before proceeding with construction. Tarrytown officials have thus succeeded for over a year now in using their local zoning powers to prevent CTC from improving and expanding its cellular service. Not only have these actions substantially delayed service to the public, they have required CTC to incur substantial, unnecessary cost and expense pursuing exhaustive litigation that in each instance has resulted in a determination adverse to the Village.

Bainbridge Island, Washington - Restrictive tower height limitations delay introduction of competitive cellular service for over four years.

- Interstate Mobilephone Company, Inc. ("Interstate"), McCaw's Seattle, WA MSA licensee, has been trying to locate a cell-site on Bainbridge Island, Washington for the past four years, but has been denied access because of local opposition. Opponents have submitted a petition opposing the siting of Interstate's proposed tower, citing aesthetic, property value and health concerns. Opponents also have argued that cellular towers will become obsolete when satellite links are developed. Despite widespread public support for the site, including two hundred signatures and endorsements from the Red Cross and the mayor, local authorities have continued to deny Interstate the necessary permits. The island's zoning code does not contemplate cellular transmission facilities, so Interstate has been told that its base station must be shorter than the applicable forty foot height limit. Interstate's engineers have determined that twenty-nine forty foot poles would be required to provide adequate service to the island if tower height is thus restricted. US West, which successfully sued the island four years ago to construct a one-hundred foot tower, is currently the only cellular service provider with facilities on the island.

Village of Mamaroneck, New York - Zoning ordinance imposes cell-siting limitations that hinder effective service.

- In July of 1994, the Village of Mamaroneck amended its zoning ordinance to prohibit more than one cellular antenna from being located on any building or structure.

New Jersey - Proposed legislation would disrupt vital police communications by imposing restrictions that would force the relocation of a critical tower.

- Proposed legislation that died before passage in 1994 (but that may be reintroduced this year) would have prohibited the New Jersey Highway Authority from erecting or permitting

the erection of communications tower facilities within three hundred feet of certain residential areas. In particular, the measure would have required the relocation of the Garden State Communications Tower, which is located on the Garden State Parkway near Paramus, New Jersey, within 90 days of enactment. The tower is used for cellular communication by NYNEX Cellular and for vital state police communications by the New Jersey Highway Authority.

- Other proposed legislation would eviscerate CTC's status as an essential service and require CTC to obtain a use variance -- the most difficult and costly type of approval -- for each cell site not permitted by right (i.e., most cites.)

CELL-SITING MORATORIA PROHIBIT DEVELOPMENT OF SERVICE

East Brunswick and Old Bridge, New York - Restrictive resolutions prohibit construction of cell-sites necessary to improve and expand service.

- Authorities in each locality passed resolutions banning cellular communication towers within 1,000 feet of a school or residential property and mandating that sites be at least 5 miles away from other towers. These and similar measures in other communities have had the effect of prohibiting entirely the build-out of essential cellular facilities.

Town of Greenburgh, New York - Moratorium adopted prohibiting cell-site construction necessary to provide service.

- The Town of Greenburgh held a public hearing on January 25, 1995, to consider adopting a one-year moratorium on the installation of commercial cellular antennae.

ARBITRARY CELL-SITING DETERMINATIONS IMPOSE SUBSTANTIAL DELAY

Dobb's Ferry, New York - Variance litigation delays construction of essential cell-site for over three years.

- In October of 1990, CTC applied for a use variance to construct a new cell site on an existing water tower in the midst of hundreds of acres of woodlands that made the site undetectable to public view from virtually all vantage points. After six separate appearances before the Zoning Board of Appeals ("ZBA"), including submission of a detailed cell-site assessment report and expert testimony on the subject of RF emissions, the variance was denied in April of 1991, based, in part, on the "fears" of RF radiation expressed by opponents of the cell-site. CTC appealed the

decision and the court reversed the ZBA's denial in January of 1992. Thereafter, opponents of the cell-site appealed and CTC was forced into additional, costly litigation. In December of 1992, almost a year later, CTC again prevailed, this time in the appellate court. Opponents of the site filed yet another challenge, and finally, in November of 1993, over three years after CTC's application for the variance, the Court of Appeals upheld CTC's right to construct the proposed facility. Cellular Telephone Company d/b/a Cellular One v. Rosenberg, 82 N.Y.2d 364 (Ct. App. 1993). Thus, for over three years CTC was prevented from upgrading its facilities to meet the thriving public demand for cellular service.

West Hollywood, California - Cell-siting denied despite favorable expert testimony following assertion that RF emissions killed a pet dog.

- In October 1993, West Hollywood officials denied a conditional use permit that had been issued to Los Angeles Cellular Telephone Company by the Planning Commission after determining that "the installation of additional roof-top microwave antennas and cellular antennas may be detrimental to the public health and safety." Several months earlier, the town had also denied the request of Pac Tel Cellular to upgrade two transmission sites, again citing health concerns. According to one press account, opposition to the cell-sites was being led by a resident who had alleged that "radiation from cellular antennas caused cancer that killed one of her pet dogs and had caused three other pets to become ill." EMF Litigation News at 525 (Nov. 1993). See McCaw's RF Comments at p. 20 n. 59. This sort of misinformed decision making regularly stifles McCaw's efforts to improve and expand its cellular service.

Town of Philipstown/Cold Spring, New York - Denial of cell-siting based upon perceived visual impact declared arbitrary and capricious.

- CTC secured a lease to install a monopole antenna on residential property. Earlier, CTC had spent two years trying to locate a suitable alternative site. An application for a special permit was requested from the local ZBA. In the interim, a mock antenna was installed for a two week period without receiving any complaints. Indeed, there was nothing to suggest that residents had even observed the antenna. Nonetheless, following a ten month review, the ZBA denied CTC's application based on the tower's perceived visual impact, noting that tourists might be dissuaded from visiting Cold Spring if the antenna were

approved. Consequently, CTC was forced to challenge the denial. Upon review, the ZBA's decision was found to have been arbitrary and capricious, and issuance of the permit was ordered.

Town of Eastchester, New York - Cell-siting halted and building permit revoked in response to local opposition.

- CTC secured a lease from the owners and a building permit from the Town to install cellular antennae on the roof of a residential condominium in the Town of Eastchester. As a result of opposition, the local building inspector revoked the building permit and issued a stop work order prohibiting the installation of the antennae. The Town Board held a hearing on December 20, 1994, to consider adopting a moratorium on the approval of permits to install cellular antennae in the Town.

Town of Southeast, New York - Local challenges delay expansion of service.

- CTC secured a lease to place cellular antennae on the roof of an existing commercial building. After a one-year review before the Planning Board and ZBA, adjacent property owners initiated a challenge to the requested approvals alleging that health and safety factors had not been considered by the Town. The court remanded the matter for reconsideration due to procedural errors, but did not address the substantive claim that health or safety issues had purportedly been overlooked. The ZBA issued a second approval and the adjacent property owners again challenged the approval, alleging health and safety issues. The proceeding is currently pending before the Putnam County Supreme Court.

City of Yonkers, New York - Cell-siting on water tower delayed while officials consider claims made by opponents of special permit.

- CTC secured a lease from the City of Yonkers for space on its water tower to install cellular antennae. Pursuant to a local zoning ordinance, a special permit must be secured from the ZBA and affirmed by the City Council which had originally authorized the lease of the water tower space. After a four-month review and public hearings, the ZBA granted the Special Permit. The City Council, while considering whether to affirm that decision, received a petition signed by 164 opponents of the cell-site demanding a denial of the Special Permit based upon health and safety issues. After several months, CTC submitted a petition with

1000 signatures supporting approval, which was subsequently granted.

LAND DEVELOPMENT PROCEDURES IMPOSE SUBSTANTIAL COSTS AND DELAY

Broward County, Florida - County determination requires cell-siting proposals to be reviewed and approved by 21 different agencies.

- Broward County officials have determined that communications tower facilities must undergo a "Major Review" by the Development Review Committee. This means that approximately 21 different review agencies must consider and approve a proposed site plan along with any required paving, drainage and landscaping proposals. This procedure, which typically requires a 60 to 90 day review period, constitutes a significant departure from procedures that were employed several years ago. Those procedures allowed such facilities to undergo a "Minor Review" that typically was accomplished in a matter of days.

  Moreover, Broward County requires in many situations that the property for a proposed facility go through a Platting procedure which can take up to 6 months. Often, the property is already platted, but the original plat simply does not indicate the use of a telecommunications facility. County officials have taken the position that such plats must be completely revised, which is almost as time consuming as the actual plat process and also requires a public hearing.

  Thereafter, upon completion of the Major Review and Platting procedures, the project must undergo yet another review associated with obtaining a building permit, which typically requires an additional 4 to 6 weeks. In sum, these procedures (i.e., the Major Review, Platting and building permit) can take eleven months per site if each step is successful on the first hearing.

State of Washington - Unnecessary state regulation requires unmanned equipment vaults to meet the same building standards as mobile homes and commercial businesses.

- Cellular equipment vaults are unmanned, prefabricated, secured concrete buildings that are designed according to national standards, the Uniform Building Code and locally recognized building codes. The vaults are manufactured and distributed by a handful of national vendors, and they are used to house equipment only.

Notwithstanding their essentially standardized nature, Washington requires prior approval of design plans as well as individual inspections of each vault. The time required to obtain state approval typically ranges from 8 to 12 weeks. The national average is one week, and nineteen states have no classification of cellular vaults and place no requirements on builders, according to vendors.

The Washington Department of Labor & Industries has ruled that since technicians must enter vaults periodically (twice monthly) to check radio equipment, the structure must be regulated as if it were a full-scale commercial building "designed and used for human habitation." Vaults must therefore meet all building standards applicable to occupied buildings such as mobile homes and business, despite the fact that they simply store radio equipment. In 1994 alone, this burdensome and unnecessary regulation has caused substantial delay in the construction of approximately 15 cell-sites.

State of California - State regulations mandating simultaneous cell-site permitting substantially hinders construction efforts.

- State officials have imposed a regulation that requires the filing of all local permits simultaneously before a cellular company can initiate any cell-site construction. This unnecessary regulation adds significant costs and delay to the construction of cell-sites, and often leads to absurd results. For example, McCaw recently secured approval to construct a new cell-site in a remote mountainous area. As construction proceeded, a snowstorm occurred which required McCaw to secure a local permit to plow some access roads. This process should have taken no more than a few hours. However, because of the simultaneous permitting regulation, construction had to be halted, and an advice letter had to be prepared by local attorneys and filed with the state Public Utilities Commission before construction could proceed.

  For this reason, permitting in Santa Barbara, for example, takes an average of two years because the state requires two levels of review. First, all local permits must be obtained simultaneously, then they must be submitted for review by the California Public Utilities Commission ("PUC"). This not only burdens the PUC, it imposes substantial costs and substantially impedes the development of new services.

In its RF Comments, McCaw offered additional examples of state and local regulatory actions that have significantly

impaired the efforts of McCaw and others to construct or modify facilities necessary to improve and expand cellular service.[18/] For instance, in Mount Kisco, New York, after a delay of nearly two years, local zoning officials denied CTC's request to replace an existing wooden monopole with an 85 foot steel monopole and sectorizing the antenna.[19/] Significantly, local officials had originally denied CTC's efforts to construct the facility, which precipitated litigation that had already delayed construction by two years and had resulted in a judgement adverse to the municipality. Similarly, in late 1990 CTC proposed to replace an existing 100 foot lattice tower on a sod farm in Long Island with a 100 foot monopole. However, the modification was opposed, based primarily upon concerns expressed regarding proximity to two schools. Because the town zoning board never issued a decision, CTC was forced to serve the area with two cell-site located elsewhere in the town. One of the sites went on-line in October of 1993, but the other has been opposed in an appeal brought against CTC and the town. Further, in early 1990, CTC proposed to erect a 125 monopole on a horse farm on Long Island. The site was opposed based in substantial part upon unfounded concerns regarding health and safety. After more than two years of opposition, the site was relocated to an existing water tank

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[18/] See McCaw RF Comments at 18-23.

[19/] Id. at 21. In stark contrast, while denying CTC's proposed modification for health and safety reasons, local officials approved a plan to mount municipal antennae on the tower that were more numerous and of greater power than CTC's proposed modification.

where no local zoning approvals were necessary.[20/] Attached hereto as Exhibit 1 is a list of court cases that further illustrate the extensive, costly litigation that CTC has been forced to undertake in response to local regulatory hurdles that have prohibited or substantially impeded the construction of vital cell-site facilities.

Conclusion

The FCC has clear legal authority to preempt state and local regulations that frustrate Federal policies seeking to promote the development of an innovative, efficient, competitive mobile services marketplace. The foregoing examples provide justification for taking such action. State and local regulations nationwide have unduly delayed the expansion of cellular service, imposed excessive costs on carriers and, ultimately, the public, and in some cases prohibited the introduction of new service altogether. Clearly, there is an immediate and compelling need for Commission action to establish uniform Federal guidelines that will prohibit states and localities from unduly interfering with the development of cellular networks and other wireless services through zoning and other land use regulations.

For these reasons, McCaw respectfully urges the Commission to issue a Notice of Proposed Rule Making promptly and to adopt rules preempting state and local regulations that have the

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[20/] Id.

purpose or effect of preventing or unreasonably delaying the construction or modification of cell-site facilities.

Respectfully submitted,

McCaw Cellular Communications, Inc.

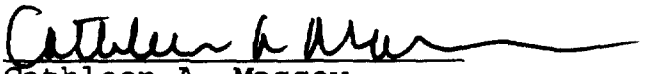

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EXHIBIT 1

EXHIBIT 1

Cellular Telephone Company v. Rosenberg, 82 N.Y.2d 364, 604 N.Y.S.2d 895 (New York Court of Appeals 1993). In this landmark decision, New York's highest court held that Cellular One is a public utility and, by virtue thereof, its application for a use variance may be judged by the lesser standard applicable to public utilities. Citing Matter of Consolidated Edison v. Hoffman, 43 N.Y.2d 598, 403 N.Y.S.2d 193, the Court affirmed the Appellate Division which affirmed the Supreme Court's decision in an Article 78 proceeding which held that, as a public utility, Cellular One had shown that the site sought was necessary to render adequate service and that no other suitable site was available. The cell site in question in this case entailed the affixing of antennas to a 70' water tower and the construction of a modular building on a 209 acre campus serving as a home for neglected children. The Court affirmed that Cellular One adequately proved that the cell site would not pose a health hazard to the surrounding area, the nearest dwelling being 400 to 500 feet from the water tower.

Cellular Telephone Company v. Meyer, 607 N.Y.S.2d 81 (A.D. 2d Dep't 1994). In this case, the Appellate Division unanimously affirmed a Supreme Court order in an Article 78 proceeding which annulled the decision of the Planning Board of the City of Glen Cove denying Cellular One's application for a special use permit and for site plan approval. The proposed site was comprised of antennas to be affixed to an already existing water tower and the erection of a modular building on the grounds of a country club. The nearest dwelling is approximately 60 feet from the water tower. The Appellate Division characterized the intrusion into the community resulting from the cell site as "very minimal." The Supreme Court, in its decision, noted that neither health nor safety was the basis for the Planning Board's denial of Cellular One's application and that any resulting noise from the site would have minimal impact on nearby residents.

Payne v. Taylor, 178 A.D.2d 979, 578 N.Y.S.2d 327 (4th Dep't 1991). In this matter, the Zoning Board of Appeals of the Town of Ellicott granted a special use permit for the erection of a 400' antenna tower in a residential district to facilitate the transmission of cellular telephone service. The Board's decision was affirmed on appeal. The Appellate Court noted that cellular communication is a public utility service and that the Zoning Board of Appeals correctly concluded that the tower would not interfere with radio reception or create health or safety risks.

Cellular Telephone Company v. Guadagno, (Supreme Court, Westchester County, Index Number 91-19458, 10/15/92). In this case, Cellular One brought an application before the Zoning Board of Appeals of the Town of Yorktown for a special use permit or, in the alternative, for a use variance for the erection of a 190' lattice tower and modular building on property leased from a private school. The nearest residence would be 800' from the proposed lattice tower. The Zoning Board of Appeals held that Cellular One is not a public utility, denied the special use permit and denied the variance on the grounds that Cellular One had failed to show undue hardship. In the Court's decision relating to the Article 78 proceeding, the Court held that Cellular One had submitted sufficient proof to show that the tower was necessary to render safe and adequate service and that no alternative site was available. The Court accepted the testimony offered by Cellular One's expert that exposure levels of electromagnetic energy would be below recognized health standards and would have no effect on the school building near the tower.

Cellular Telephone Company v. Goehringer, (Supreme Court, Suffolk County, Index Number 91-17944, 2/11/92). In this matter, the Southold Town Zoning Board of Appeals denied Cellular One's application for a special exception permit. The Supreme Court granted Cellular One's application brought pursuant to CPLR Article 78 reversing and annulling the Zoning Board of Appeals' denial. The proposed cell site in this case consisted of a 104' monopole with modular building adjacent thereto to be erected in a limited business district on an 80,000 square foot parcel. The Court held that Cellular One is a public utility and that the health impact on the cell site would be negligible.

Cellular Telephone Company v. Hartmann, (Supreme Court, Putnam County, Index Number 93-1520, 10/5/93). In this case, Cellular One's application to the Zoning Board of Appeals of the Town of Philipstown for a special use permit, interpretive ruling, and area variance was denied. Cellular One brought an Article 78 proceeding seeking a judgment annulling and setting aside the Zoning Board of Appeals' decision. This proposed cell site was to be made up of a 100' monopole and modular building. The Supreme Court granted Cellular One's petition citing **Cellular One v. Rosenberg** as authority for holding that Cellular One is a public utility to be adjudged by the lesser standards afforded to public utilities in zoning matters. In ruling in favor of Cellular One, the Court noted that there was no community opposition to Cellular One's application and that the Board's conclusory opinion of the site's potential for negative aesthetic impact and damage to tourism and real estate values was not supported by the record.